

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 23.01.2007

CORAM:

THE HONOURABLE MR.JUSTICE A.C.ARUMUGAPERUMAL ADITYAN

S.A.No.232 of 1997

Durairaj

.. Appellant/Plaintiff

vs.

1.Rathinammal

2.Ramu

3.mahalingam

4.Kumar

.. Respondents/Defendants

Prayer: This second appeal has been filed under section 100 of CPC.against the decree and judgment, dated 03.10.1996 in A.S.No.202 of 1993 passed by the Principal District Court at Vellore N.A.District, reversing the judgment and decree of the District Munsif Court At Gudiyattam, N.A.District, dated 21.09.1993 in O.S.No.801 of 1983.

For Appellant : Mr.G.Rangarajan

For Respondent No.1 : Mr.N.Vanchainathan

RR 2 to 4 : No Appearance

This second appeal has been preferred against the decree and judgment in A.S.No.203/1993 on the file of the Court of Principal District Judge, Vellore. The plaintiff, who has won the case before the trial Court could not succeed in the first appeal preferred by the defendants, has preferred this second appeal.

2. The short facts of the plaintiff's case as narrated in the plaint are as follows:-

The suit has been filed by the plaintiff for declaration of title and consequential permanent injunction in respect of the plaint schedule property. The plaintiff is the youngest son of one Periyapaiyan and the other two elder brothers are Duraisamy and Mahadevan. As per the Koorchit entered into between the brothers on 5.1.1972 the plaint schedule property was allotted to the share of the plaintiff and from that date onwards the plaintiff is in possession and enjoyment of the plaint schedule property. The mother of the plaintiff is Ayammal who died on

1.1.1979. After her death, the plaintiff is in possession and enjoyment of the plaint schedule property. 3 acres 95 cents in S.No.13 was purchased in benami in the name of the mother of the plaintiff viz. Ayammal. The suit property was purchased out of the joint family income in the name of Ayammal. Ayammal is only a benamidar. The property in the name of Ayammal was partitioned among three sons of Ayammal on 5.1.1972. The plaintiff's elder brother Mahadevan died some three years back. While Mahadevan was alive he never objected to for the plaintiff's enjoyment over the suit property. After the death of Mahadevan his wife first defendant claimed right and title in respect of the plaint schedule property on the basis of a Will said to have been executed by Ayammal five days prior to her death in respect of 3 acres 95 cents. The plaintiff does not know anything about the above said Will. The said Will is not a genuine document. Plaintiff's mother Ayammal was bed ridden even three years prior to her death. She was in a unconscious state of mind and was lying in stupor. The said Ayammal has no right or title in respect of the suit property to execute the alleged Will in favour of the first defendant, since the property was purchased as binamy in the name of Ayammal from out of the joint family funds. As per the partition dated 5.1.1972, the plaintiff is in possession and enjoyment of the suit property by paying land tax. Sine the defendant made an attempt to interfere with the peaceful possession and enjoyment of the plaintiff over the suit property, the plaintiff has filed the suit.

3. The first defendant has filed a written statement adopted by the defendants 2 to 4 as follows:-

The suit is not maintainable as per the law and facts. The defendants admit the relationship between the parties. Mahadevan, Duraisamy and the plaintiff are the three sons of Periyapaiyan and Ayammal and their daughters are Pappammal and Rajammal. The first defendant is the wife of the deceased Mahadevan. D2 to D4 are the children of the deceased Mahadevan and first defendant. It is not true to say that the brothers have partitioned the suit property as per the partition dated 5.1.1972. No one is in possession of their respective shares as per the above said partition deed. The possession in respect of the suit property was not entitled to the plaintiff in lieu of the said Koorchit dated 5.1.1972. The allegation that the plaintiff is in possession and enjoyment of the suit property even after the death of Ayammal is false. The allegation that 3 acres 95 cents in S.No.13 was purchased out of the nucleus income of the joint family in the name of Ayammal is not true. Even before 5.1.1972 the above said 3 acres 95 cents was not enjoyed in common. The facts is that Ayammal had purchased 3 acres 95 cents viz. Plaint schedule property in S.No.13 from out of her own income by selling sheeps and gold ornaments. Under the sale deed dated 12.3.1943, the above said 3 acres 95 cents belongs to Ayammal exclusively. The said Ayammal was paying land tax to the suit property and is enjoying 3 acres 95 cents exclusively. Ayammal was under the maintenance and care of the first defendant at the time of her death. Out of love and affection towards the first defendant Ayammal had executed a Will dated 25.12.1978 bequeathing 3 acres 95 cents in S.No.12. Within 1 or 2 days after

executing the said Will, Ayammal died due to heart attack. After the death of Ayammal, the first defendant is in possession and enjoyment of the suit property by paying land tax. Hence, the suit for permanent injunction is not maintainable. The Will dated 25.12.1978 was executed by Ayammal while she was in sound disposing state of mind. The allegation that Ayammal was bed ridden for nearly three months before her death is travesty of truth. Only to obstruct the legal possession and enjoyment of the defendant in respect of the plaint schedule property the suit has been frivolously filed by the plaintiff. The alleged Koorchit dated 5.1.1972 is not a valid one. The sons of Ayammal have no right to partition the suit property under Koorchit during the life time of Ayammal. In the above said Koorchit neither Pappammal nor Rajammal were included. The suit is also bad for non-joinder of necessary parties like Pappammal and Rajammal. Hence the suit is liable to be dismissed with costs of this defendants.

4. The learned trial judge on the basis of the above said pleading has framed as many as seven issues. On the side of the plaintiff P.W.1 to P.W.4 were examined and Ex.A.1 to A.18 were marked. On the side of the defendants, D.W.1 to D.W.18 were examined and Ex.B.1 to B.8 were marked.

5. On the basis of the available evidence both oral and documentary the learned trial Judge has decreed the suit as prayed for. Aggrieved by the findings of the learned trial Judge, the defendants have preferred the appeal in A.S.No.202/1993 before the Principal District Judge, Vellore, which was allowed by the first appellate Court. Against that the present second appeal has been preferred by the plaintiff.

6. The substantial question of law involved in this second appeal are as follow:-

(i) Whether the first appellate Court erred in not considering the point of objection raised by the counsel for the appellant/Plaintiff herein with regard to the validity of the evidence of D.W.3 under law since it has been held by the Supreme Court in its decision reported in A.I.R.1990 Supreme Court page 1888 that the Registering authority can not be a statutory attesting witness to prove a Will under Section 74 of the Indian Succession Act 1925?

(ii) The first appellate Court erred in not upholding decision of the trial Court that the contents of Exhibit.A.17 the unregistered partition Deed the so called Koorchit could be relied on by the Court to believe that there had been a partition between the brothers of the plaintiff according to the rulings reported in 1990(ii) MLJ 300, 1991(i) MLJ 52, 1989 (ii) MLJ 19 and 1988(ii) MLJ 309?

(iii) Whether the first appellate Court erred in not considering the point that the onus of proving the Ex.B.2, the Will, is heavily on D.W.1 the Propounder since it has been contended by the plaintiff that the same has been executed under suspicious circumstances according to the ruling reported

in 1992(ii) Law Weekly 726?

7. The points:-

7(a) Admittedly the plaintiff is the brother of one Mahadevan and Duraisamy, the children of Periyapaiyan and Ayammal. The first defendant is the wife of the deceased Mahadevan one of the brothers of the plaintiff. D2 to D4 are the children of D1 and deceased Mahadevan. The plaint schedule property is 1 acre 20 cents out of 3 acres 95 cents in S.No.13 in Shalamur Village, Katpadi sub-division, Guidyattam Taluk. It is the definite case of the plaintiff that he got the property under a koorchit dated 5.1.1972 entered into between the plaintiff and his brothers Mahadevan and Duraisamy. Admittedly the plaint schedule property was purchased by the plaintiff's mother Ayammal under Ex.B.1-sale deed dated 12.3.1943. It is a registered document. The entire 3.95 cents under S.No.13 was sold by one Munusamy and another in favour of Ayammal, the wife of Periyapaiyan.

7(b) It is pertinent to note that under Ex.A.17-koorchit, which is an unregistered document, for which, stamp duty penalty has subsequently been collected under Article 45 of the Indian stamp Act. The said Ayammal, who had purchased the plaint survey number property under Ex.B.1 was not made as a party. Ex.A.7 is dated 5.1.1972 on which date the Indian Succession Act 1956 is in force and under Section 14 of the Indian Succession Act 1956, Ayammal is having full title in respect of the suit survey number property which was purchased by her under Ex.B.1. But when the said Ayammal, the plaintiff and other two brothers have entered into koorchit (Ex.A.17) it will not bind Ayammal. It is pertinent to note that Ayammal has not signed in Ex.A.17. There is only a provision made in Ex.A.17 to give Rs.500/- to Ayammal. So as rightly held by the first appellate Court under Ex.A.17, the plaintiff cannot claim any right or title in respect of the plaint survey number property. On the other hand the first defendant who is none other than the widow of one of the brothers of plaintiff viz. Mahadevan would claim right and title in respect of the suit property under Ex.B.2-Will said to have been executed by Ayammal in favour of her on 25.12.1978. Ex.B.2 is a registered Will.

7(c) As per Section 63 of the Indian Succession Act as well as under Section 68 & 69 of the Indian Evidence Act, the will is to be proved at least by examining one of the attestors. One of the attestors to Ex.B.2-Will is one Jeyaraj. The said Jeyaraj was examined as D.W.2. D.W.2 in his evidence would depose that he has signed as a witness in the Will-Ex.B.2 at the sub-registrar's office at Katpadi and that the other attestor to Ex.B.2-Will is Adimula, who is now no more and that the scribe of Ex.B.2 is one Duraisamy and that the recitals were written by him as narrated by the testator Ayammal and that the Will was read over to Ayammal and thereafter she affixed her left thumb impression in his presence and that he has signed as a witness in Ex.B.2-Will after another witness Athimulam signed and that Ayammal also witnessed he having signed in the Will and the other witness also saw while he signed in the Will and Ayammal affixed her left hand thumb impression in it. He would categorically depose that at the time of executing Ex.B.2-Will, Ayammal was very sound state of mind.

7(d) Apart from D.W.2, D.W.3-Sub Registrar, who had registered Ex.B.2-Will, was also examined on the side of the defendants. D.W.3 has also deposed to the effect that only in her presence Ex.B.2-Will was registered and at the time of registration of the Will the testator of the Will Viz. Ayammal was in a sound disposing state of mind as per her enquiry. D.W.3 further deposed to the effect that she had registered Ex.B.2-Will only after ascertaining the mental condition of the testator as to the sound disposing state of mind. So, the defendants have proved Ex.B.2-Will as per the requirements contemplated under Section 68 of the Evidence Act.

7(e) The learned counsel appearing for the appellant would contend that Benami Transaction Prohibition Act will not be applicable to the pending proceedings and that the question whether the sale deed executed in favour of Ayammal is a benami transaction and that the consideration for the sale deed Ex.B.1 was paid out of the income of the joint family properties. Even the recitals in Ex.B.1 dated 12.3.1943 will clearly go to show that the said property was purchased out of the income of Ayammal and also out of the sale proceeds of her jewels. Further under Section 100 of CPC, the question whether Ex.B.1-sale deed was taken in benami in the name of Ayammal cannot be gone into at the time of second appeal. To this proposition of law the learned Counsel for the appellant relied on 2000(3) MLJ 149 (Sundaram Nadar Vs. Sukumaran), wherein it has been held by the learned Judge of this Court as follows:-

"In the following decisions:

1. Rabti Devi Vs. Ram Dutt (1997)11 SCC 714,
2. Satya Gupta (Smt) Alias Madhu Gupata Vs. Brijesh Kumar, (1998)6 SCC 423 and 3. Pawan Kumar Gupta Vs. Rochiram Nagdeo, AIR 1999 SC 1823.

It has been held that the decision as to whether a particular transaction is a benami transaction or not is a question of fact and the High Court should be loathe to interfere under Section.100, CPC. It has been further observed by the Supreme Court and several High Courts in cases that the High Court while exercising jurisdiction under Section 100, CPC cannot reverse the findings of the lower appellate Court on facts merely on the ground that on the facts found by the lower appellate court another view was possible."

So from the above said ratio decidendi, the findings of the first appellate Court regarding as to Ex.B.1-sale deed is not a benami transaction cannot be reversed in Second Appeal as per provisions under Section 100 of CPC.

7(f) Just like that the findings of the first appellate Court in respect of the genuineness of the Will Ex.B.2 cannot also be interfered with in second appeal by this Court as per the provisions under Section 100 of CPC and as per the ratio decidendi in 1992(2) LW 726 (Smt.Guro Vs. Shri Atma Singh & ors.). The exact observation regarding this point by the Honourable Apex Court is as follows:-

"The High Court, in our opinion, was not justified in reversing the findings of fact recorded by the appellate Court

which were based on a proper appreciation of the evidence on record. In doing so, the High Court has failed to attach sufficient importance to the various suspicious features relating to execution of the will that were pointed out by the appellate Court. The High Court has not even noticed the fact that the testator had died within 8 days of the execution of the will and there is a recital in the will that the testator had been ill for a long time and was seriously ill at the time of execution of the Will. In view of the said recital, it was necessary for the plaintiff-respondent No.1 to adduce satisfactory evidence with regard to the nature of the illness of the testator and about his mental capacity to execute the Will."

In the case on hand there is absolutely no evidence on record on behalf of the plaintiff to show that Ayammal was seriously ill and was bed ridden and not in a sound conscious and sound disposing state of mind to execute Ex.B.2-Will. The learned first Appellate Court after considering all those points has come to a definite conclusion that Ex.B.2 is a genuine Will. It is seen from Ex.A.18-death certificate relating to Ayammal that she died on 01.01.1979 i.e., one week after the execution of the Will. The learned counsel appearing for the appellant would contend that even though Ex.B.2-Will was executed on 25.12.1978, it was registered on 28.12.1978 and within three days thereafter the testator Ayammal died, which leads to a suspicious circumstance. But the evidence of D.W.3, Sub-Registrar, who registered Ex.B.2-Will, will clearly go to show that on the date of registration of Ex.B.2-Will Ayammal was hale and hearty. According to D.W.1, Ayammal died only due to heart attack. Under such circumstances, it cannot be said that Ex.B.2-Will was executed under a suspicious circumstance.

7(g) A vain attempt was made by the appellant by contending that D.W.3, the Registering Authority(Sub-Registrar) cannot be a statutory attesting witness as per Section 74 of the Indian Succession Act. For this proposition of law, the learned counsel for the appellant relied on AIR 1990 SC 1888 (Dharam Singh Vs. Aso and another), wherein it has been held by the Honourable Apex Court as follows:-

"The two attesting witnesses did not support the execution of the Will. The trial Court relied upon the statement of the registering authority and on the basis of decisions of the Lahore and Punjab and Haryana High Courts found that the Will had been proved. The lower appellate Court revered the decision by relying upon two decisions of this Court in M.L.Abdul Jabbar Sahib Vs. H.V.Venkata Sastri & Sons, (1969) 3 SCR 513 : (AIR 1969 SC 1147) and Beni Chand (since dead) now by Lrs. Vs. Smt.Kamla Kunwar (1977)1 SCR 578 : (AIR 1977 SC 63).

The above said dictum will not be applicable to the present facts of the case because the Will Ex.B.2 has been proved by examining one of the witnesses viz. D.W.2 in this case. Only to prove that the testator Ayammal was in sound disposing state of mind on the date of registration, D.W.3, Sub-Registrar, was examined on the side of the defendants. Under such circumstances, I do not find any reason to interfere with the well

considered judgment of the learned first Appellate Court in A.S.No.202/1993 on the file of the Court of the Principal District Judge, Vellore, which does not suffer from any illegality or infirmity. Point is answered accordingly.

8. In the result, the second appeal is dismissed with costs confirming the decree and judgment in A.S.No.202/1993 on the file of the Court of the Principal District Judge, Vellore.

ssv

Sd/-
Asst.Registrar

/true copy/

Sub Asst.Registrar

To,

- 1.The Principal District Judge,
Vellore.
- 2.The District Munsif, Gudiyatham.
- 3.The Record Keeper, V.R.Section, High Court,
Madras-104.

JSK(CO)
dcp/26.2.07

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